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Supreme Court of the United States

OCTOBER TERM—1960

No. 508

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

The University of the State of New York, appellee herein, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves this Court to dismiss or affirm, with costs, the appeal taken herein to this Court by the National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel, and Saul Gurevitz, appellants, upon the ground that there is no substantial federal question involved and that it is devoid of merit, that the appeal is moot as to the individual appellants and that the corporate appellant lacks standing to maintain this appeal.

Dated: New York, N. Y., January 3, 1961.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Appellee.

Opinions Below

The opinion of the New York Supreme Court, New York County, directing the entry of judgment declaring that Article 153 of the Education Law of the State of New York is not unconstitutional, is reported in 18 Misc. 2d 722, 188 N.Y.S. 2d 151.

The Appellate Division, First Department, affirmed without opinion (10 A. D. 2d 688). The judgment of the Appellate Division was affirmed by the New York Court of Appeals. Its opinion is reported in 8 N. Y. 2d 197. The remittitur of the Court of Appeals is annexed to the jurisdictional statement at pages 25-27.

Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated July 8, 1960, which unanimously affirmed a judgment of the Appellate Division, First Department, dated March 21, 1960, which, in turn, affirmed a judgment of the Supreme Court, New York County, dated June 20, 1959, adjudging that Education Law, Article 153 was *not* unconstitutional.

The appellants contend that this Court has jurisdiction on the ground that substantial constitutional questions are presented. The appellee contends that such issues are unsubstantial and utterly devoid of merit and that appellants presently lack standing, and that as to the individual appellants, the appeal is moot.

Statute

The statute involved is Article 153 of the Education Law of the State of New York.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Introduction

The action resulting in the judgment appealed from was brought for a declaratory judgment declaring New York Education Law, Article 153, comprising §§ 7601 to 7614, unconstitutional on its face and enjoining the University of the State of New York from enforcing the provisions of this statute.

The corporate appellant, referred to as "NPAP", is a membership corporation which is incorporated under New York State law for the advancement of psychoanalysis as a science (Education Law § 216). It is not authorized by its corporate charter to provide instruction and training or to operate as a training school for psychologists or in any other way as a school, college or university, yet it has operated a training program to prepare interested persons to practice or teach *psychoanalysis* under the guise of preparing them for membership. Each of the individual appellants holds a Ph. D. degree in psychology or related subjects, granted by European universities, and each has been a practicing psychologist in the State of New York for at least ten years.

Article 153 was added to the Education Law in 1956, and became effective on April 17 of that year. This statute provides that no person shall represent himself as a psychologist within the meaning of the statute unless certified and registered as therein prescribed. *It thus prohibits no one from practicing psychology, but only proscribes the professional use of the title "psychologist", and its derivatives by persons not certified in connection with services to the public.* As in other similar statutes, this statute provides, in § 7601 thereof, a guide for deter-

mining when a person is represnting himself as a psychologist or is rendering psychological services within the meaning of such statute. The statute also prescribes the educational and experience requirements necessary for certification (§ 7605); and provides penalties for violations of its provisions by non-certified persons (§ 7608).

Message of the Governor in Approving the Bill

"This bill recognizes and gives status to the profession of psychology. It prohibits any person in the State of New York from calling or holding himself out as a psychologist and accepting pay for performing psychological services unless he has been certified by the State Education Department.

To accomplish this, a board of examiners, in psychology is established under the State Education Department for the purpose of establishing minimum requirements and appraising the qualifications of persons applying for certification.

A certificate will be issued to any person with good moral character who meets the educational and experience requirements and satisfactorily passes an examination in psychology. However such examination is not required of persons who meet the educational and experience requirements on or before July 1, 1957 or of honorably discharged veterans who meet such requirements on or before July 1, 1958.

This bill is the result of the joint efforts of the Commissioner of Mental Hygiene, the State Education Department, the Joint Council of New York State Psychologists on Legislation, the New York State Medical Society, the American Psychological Association and the American Psychiatric Association.

The bill is approved by the following State departments and private organizations: Department of Men-

tal Hygiene, Department of Education, Department of Health, Division of the Budget, New York Society of Clinical Psychologists, American Veterans Committee, Syracuse Psychological Association, Nassau County Psychological Association, Brooklyn Psychological Association, Rochester Psychological Association, New York Personnel and Guidance Association, New York State Psychological Association, Westchester County Association of Psychologists, Psychological Association of Western New York, Rockland County Psychological Association, Suffolk County Psychological Association, Individual Psychological Association of New York, National Psychological Association for Psychologists, Group for Freudian Psychotherapy, Post Graduate Center for Psychotherapy, Association of Psychologists in New York Schools and Syracuse-Onondaga Council of Social Agencies.

In addition, numerous eminent psychologists and educators have written urging approval of this bill.

Similar legislation has already been enacted by the States of Connecticut, Maine, Minnesota, Virginia, Kentucky, Georgia, Washington, Arkansas and Tennessee.

The bill is approved.

AVERELL HARRIMAN."

State Proceedings

In their complaint, appellants alleged that by reason of the enactment of this statute NPAP was threatened with grave injury and irreparable loss in that its training program for its prospective members was not acceptable as the equivalent of the educational requirements for certification, resulting in a loss of trainees and a *possible* discontinuance of the publication of its quarterly journal, thus rendering its charter "valueless".

It was further alleged that the individual appellants might not be able, after the law became effective as to them, to continue to hold themselves out to the public, or render services to the public, as psychologists, the loss of which privilege would result in immediate and irreparable loss, injury and damage to them in reputation and in the practice of their profession.

After answer, appellants moved in the Supreme Court, New York County for summary judgment, and appellees cross-moved for judgment dismissing the complaint as insufficient in law. The motion for dismissal was denied. However, in determining a motion for summary judgment, the Court may grant judgment to any of the adverse parties entitled thereto (N. Y. Rules of Civil Practice 113). In accordance with such provisions, the Court granted the motion for summary judgment in favor of defendant to the extent of directing the entry of judgment declaring that Article 153 of the Education Law was *not* unconstitutional.

The Court's opinion extensively discussed Article 153 of the Education Law and the contentions here at bar (18 Misc. 2d 722). It found that appellants had not overcome the presumption of validity of the challenged statute and had not demonstrated that the provisions thereof were in violation of the State or Federal constitution.

On appeal, the judgment of the State Supreme Court was affirmed unanimously, without opinion, by the Appellate Division, First Department, and affirmed unanimously by the New York Court of Appeals. The comprehensive opinion of the Court of Appeals is annexed to the Jurisdictional Statement at pages 14-21.

The absence of any justiciable controversy or standing upon this appeal, the appeal is moot as to the individual appellants.

The individual appellants have since the commencement of the action in the Supreme Court of New York obtained

certification under the statute. They applied for and obtained the benefits of the statute and are now in the class of those entitled to use the title "psychologist" (Juris. St. p. 14). Three of the individual appellants received such certification by June, 1959 and the remaining individual appellant in December, 1959. The New York Court of Appeals recognized that both the individual appellants and NPAP lacked any justiciable standing, but decided, nevertheless, to dispose of the appeal upon the merits because "the question involved is of important public interest and one likely to rise again".

The discretion exercised by that Court to render, in effect, an advisory opinion, is not available to appellants here. Appellants could not accept the benefits of the statutory provisions and continue with their attack upon its asserted unconstitutionality. *Fahey* v. *Mallonee*, 332 U. S. 245, 255; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Buck* v. *Kuykendall*, 267 U. S. 307, 316; *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208.

Furthermore, the case as it reaches this Court has assumed the attribute of mootness. These individual appellants are no longer aggrieved (even if they were before the commencement of the action below). They have qualified and received certificates. They no longer have any individual interest. They are simply self-appointed private champions of an indefinite group of others in defiance of public health and welfare. This is a role for which they are miscast. *United Public Workers* v. *Mitchell*, 330 U. S. 75. The case of *Leonard* v. *Earle*, 279 U. S. 342, cited by appellants (Juris. St. p. 8), is not in point.

Moreover, NPAP never has had any justiciable interest, as the New York Court of Appeals implicitly held here, in accordance with the established principle that only a person whose legal rights are invaded can raise constitutional questions and then only as to the particular respect

by whih invasion is alleged to occur. *Doremus* v. *Board of Education*, 342 U. S. 429; *United States* v. *Raines*, 362 U. S. 17; *United States* v. *Ansani*, 240 F. 2d 216 (7 Cir.), cert. den. sub nom. *Milner* v. *United States*, 353 U. S. 936, rehearing den. 353 U. S. 978; *Hoffman* v. *O'Brien*, 339 U. S. 955.

NPAP's legal rights are wholly unaffected by the statute. As has been here pointed out, it had and has no corporate rights to train persons to become psychologists. In effect, NPAP had been exercising a quasi-licensing system in derogation of New York Law. *Matter of Fink* v. *Cole*, 302 N. Y. 216; *Murtha* v. *Monaghan*, 4 N. Y. 2d 897. It cannot, by assuming *unauthorized* corporate powers, allege that they are invaded by the statute. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 119, 144; *Matter of De Peyster's Estate*, 210 N. Y. 216.

The position of NPAP here is contrasted with that of appellant in *Pierce* v. *Society of Sisters*, 268 U. S. 510, cited by appellants, where this Court held that the schools had standing to challenge the statute before this Court only because it affected the legal right *for which they had been chartered* to receive pupils. This is not the case here.

The reference by appellants in the Jurisdictional Statement and the inclusion by appellants in the Appendix (pp. 21-22) of two asserted "unreported opinion(s)" should be stricken. *They were not and could not be part of the record in the New York Court of Appeals.* At folio 185 of the record in that Court, counsel for appellants conceded:

> "It was stipulated when the individual plaintiffs were added as parties, that these decisions and the orders entered thereon were without prejudice and NPAP does not claim that either of them has any binding effect on this Court" (the State Supreme Court).

This belated effort of appellants is on a par with the change in attitude of NPAP with respect to the challenged

statute. NPAP supported the statute at the time of its passage, and, as the New York Court of Appeals determined, instituted this action only when appellee failed to accept the *ultra vires* program of NPAP as satisfying the academic requirements of the statute, contrary to NPAP's expectation at the time it supported the statute (Juris. St. p. 20). NPAP can not, in good faith, claim to be aggrieved by a statute which it had a hand in having enacted.

No Substantial Federal Question is Involved, Nor is There Any Substantial Merit to the Appeal

A.

The regulation of psychologists by certification is a reasonable exercise of the police power of the states and presents no question of due process.

Regulation of callings and occupations has long been recognized as a proper exercise of the State's police power. *Breard* v. *City of Alexandria*, 341 U. S. 622; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424; *Linehan* v. *Waterfront Comm. of N .Y. Harbor*, 347 U. S. 438, rehearing den. 347 U. S. 994; *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168. Particularly is this so in the case of professions or callings concerned with health. *Barsky* v. *Bd. of Regents*, 347 U. S. 442, 449, 451.

This regulatory method of certifying persons in certain professions (and trades) has been used and upheld for a long period of years in New York, as the New York Court of Appeals noted (Juris. St. p. 17); in other states, *Heller* v. *Abbess*, 134 Fla. 610, 184 So. 122; *Wangerin* v. *Wisconsin State Bd.*, 223 Wis. 179, 270 N. W. 57; and by this Court in *Lehmann* v. *State Bd. of Public Accountancy*, 263 U. S. 394. Here, as in the cases cited, rendition of services is not barred. Use of the title in the rendition of such services for a consideration is the concern of the statute. Thus, the Legislature has not extended its hand as far as it

might properly reach. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

The regulatory method is reasonable and substantially related to the objectives sought to be obtained for the protection of the public from incompetent and unqualified practitioners of psychology and, thus, the requirements of due process are satisfied ever since *Nebbia* v. *New York*, 291 U. S. 502, 525. The same form of regulation to eliminate the quack has been adopted in at least eleven other states. (Full licensing statutes have been enacted in four others.) Whether the particular method will, in fact, mitigate the evil is not an issue before this Court. *Beauharnais* v. *Illinois*, 343 U. S. 250, 262.

The extensive study of the problem of psychologists and the effect of the uncontrolled rendition by them of services is reported in the Governor's message, the record and the opinion of the New York Court of Appeals. This necessity to mitigate the evil was earlier discussed in 51 Columbia Law Rev. 473, 484-485 which concluded that the remedy could not be effective "unless the professional use by non-certificants of the very terms which have captured the popular imagination is proscribed". (See also footnote 85.)

The power of the Legislature to insist upon a standard of learning, such as the receipt of a degree, as a condition to the issuance of certificates is long established. *Bradwell* v. *State of Illinois*, 16 Wall. 130; *Dent* v. *West Virginia*, 129 U. S. 114; *Brearley School, Ltd.* v. *Ward*, 201 N. Y. 358, 363; *People* v. *Griswold*, 213 N. Y. 92. The requirements in § 7605.1 (Appendix p. 31) are in no respect unreasonable and appellant's objection based upon the "degree" requirement or the nature of the studies specified is devoid of constitutional substance. Cf. *Highland Farms Dairy Inc.* v. *Agnew*, 300 U. S. 608; *Institute etc.* v. *University of the State of New York*, 274 N. Y. 504.

The responsibility confided in the Board of Examiners to pass upon the acceptability of the applicant's experience (App. p. 32) does not furnish the Board with arbitrary power of exclusion. *Lieberman* v. *Van de Carr*, 199 U. S. 552; *Douglas* v. *Noble*, 261 U. S. 165. Its ruling is "subject to review by the commissioner at the request of the applicant" and, as the Court of Appeals noted (App. p. 15) there is the right of judicial review of any disposition refusing "to issue or renew a certificate" (§ 7607). It cannot be presumed that the Board and the Commissioner will apply the standards in the statute arbitrarily, *Lieberman* v. *Van de Carr*, 199 U. S. 552, 562, but if they should, their disposition is thus subject to judicial challenge and there is the requisite protection against abuse of power. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 616.

The standards and limitations set out in the statute are ample "to govern the exercise of the power of certification, and the attack on this ground (unlawful delegation) cannot be sustained * * *", as the New York Supreme Court held, citing, *inter alia*, *City of Utica* v. *Water Pollution Board*, 5 N. Y. 2d 164, 168. See also, *Matter of Dougherty* v. *State Harness Racing Comm.*, 309 N. Y. 992, reargument den. 1 N. Y. 2d 827; *Elitg Dairy Products* v. *Ten Eyck*, 271 N. Y. 488; *Mandel* v. *Board of Regents*, 250 N. Y. 173; *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101. The New York Legislature has specified the standards in as detailed a fashion as is reasonably practicable under the circumstances, as appears from the New York Court of Appeals opinion. It was not required to do more. *Lichter* v. *United States*, 334 U. S. 742, 785; *American Power & Light Co.* v. *Securities and Exchange Comm.*, 329 U. S. 90, 105, *Linehan* v. *Waterfront Comm. of N. Y. Harbor*, 347 U. S. 438, reargument den. 347 U. S. 994; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Yakus* v. *United States*, 321 U. S. 424; *Stewart* v. *Bowles*, 322 U. S. 398, 407.

In any event, the question of delegation of power is not a federal question. The inquiry ends with the determination that the regulatory method is reasonable and substantially related to the objectives sought to be obtained, and does not confer an arbitrary discretion upon the administrative agency. *Nebbia* v. *New York*, 291 U. S. 502; *Douglas* v. *Noble*, 261 U. S. 165. Therefore, the extent of the discretion, or the definiteness of the standards contained in a state statute is "a question of state law". *Douglas* v. *Noble*, 261 U. S. 165, 168; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608; *Lieberman* v. *Van de Carr*, 199 U. S. 552.

Discussion of the "void for vagueness" rule used in testing criminal statutes, emphasized by appellants, is, of course, not relevant to any of the provisions in the statute providing for certification. *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722. Cf. *Yakus* v. *United States*, 321 U. S. 414, 488. Moreover, there has been no claim of threatened criminal prosecution under § 7608 (Appendix p. 33), the only section providing any criminal penalty.

In any event, that rule is fully satisfied here, as the New York courts pointed out in their opinions. The purpose of that rule is to give the accused sufficient warning of the kind of activity which is made criminal. *Communications Ass'n* v. *Douds*, 339 U. S. 382, 413. Appellants are not compelled to guess or estimate what is intended by this statute. The Legislature used words and phrases well enough known to enable persons of reasonable understanding to accurately construe its provisions. This is all that is required. *Roth* v. *United States*, 354 U. S. 476, reh. den. 355 U. S. 852; *United States* v. *Petrillo*, 332 U. S. 1; *Nash* v. *United States*, 229 U. S. 373. The New York Court of Appeals said, in this connection (Appendix, p. 20):

> "The short answer to this thoroughly untenable argument is that section 7605, in practical effect, defines a psychologist as an individual who meets prescribed

standards of fitness, and since the statute merely prosecutes *the use of specific words to describe* the rendition of services, without making it criminal for non-certificants to render such services, no further definition of that term is constitutionally required or necessary (See *Pitts* v. *State Bd. of Examiners of Psychologists*, 222 Md. 224, 160 A. 2d 200, 201). The statute is easily complied with by the non-use of particular words, and hence it completely satisfies the requirement that a criminal statute must be sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which is to be obeyed" (*People* v. *Firth*, 3 N. Y. 2d 472, 474).

B.

Any other constitutional objections are, likewise, insubstantial.

In the course of the allegations of their amended complaint, appellants alleged also violation of the First Amendment, but neither in the brief before the New York Appellate Division nor that submitted to the Court of Appeals was there any discussion of that averment, and we stated in our brief in the Court of Appeals (p. 4), "we assume it has been abandoned". In this Court, the appellants refer to the First Amendment (Juris. St. pp. 2, 4), which they did not argue below, but completely fail to show any basis for any assertion that such amendment bars the states from protecting the public against charlatans and incompetent quacks by proscribing the use of the title "psychologist" in connection with the rendition of services. Furthermore, there is no substance to any "equal protection" argument. The reasonableness of the provisions for the certification of psychologists and their direct relation to the purposes of the legislation has been demonstrated under the discussion of due process, *supra*. Legislation satisfying these standards does not deny equal protection of the laws. *Railway Express* v. *New York*, 336 U. S. 106.

Appellants, in their amended complaint, urged that the statute deprived "qualified persons" of "the rights, privileges and immunities secured to them by the First and Fourteenth Amendments of the Federal Constitution". No specific reference was made to the privileges and immunities clause of Article IV, § 2 of the Constitution. Nevertheless, it should be pointed out that no discrimination against citizens of other states in favor of local citizens exists under the statute. *Douglas* v. *N. Y., N. H., & H. R., Co.*, 279 U. S. 377; *Hague* v. *C.I.O.*, 307 U. S. 496, 511; *Madden* v. *Kentucky*, 309 U. S. 83, 92; *Slaughter House* case, 16 Wall. 36.

It is manifest that no merit exists as to any of these contentions of appellants and that the appellants fail to set forth any substantial ground for attacking the validity of Article 153. Therefore, we respectfully urge that this appeal be dismissed, or the judgment of the New York Court affirmed.

CONCLUSION

The appeal should be dismissed, or the judgment affirmed.

Dated: New York, N. Y., January 3, 1961.

Respectfully submitted,

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